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Title 28 U.S.C. Sec. 1254(1) 2

IN THE

Supreme Court of the United States

October Term, 1957

No.

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

—against—

ANNA HALECKI, Administratrix ad Prosequendum of the Estate of Walter Joseph Halecki, deceased, and ANNA HALECKI, Administratrix of the Estate of Walter Joseph Halecki, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on January 10, 1958.

Opinions of the Court Below

The majority opinion of the United States Court of Appeals for the Second Circuit (Circuit Judge Hand and Circuit Judge Hincks) and the dissenting opinion of Circuit Judge Lumbard is reported at 251 F. 2d 708, and is set out in the appendix to this petition (pp. 21-39). The judgment of the United States Court of Appeals is also set forth in the appendix to this petition (pp. 40-41).

Jurisdiction

The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of New Jersey and the defendant a New York corporation.

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 10, 1958. The rehearing was denied on January 31, 1958. Petition for hearing *en banc* was denied on February 20, 1958.

The jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1254(1).

Questions Presented

1. Whether an action, brought pursuant to a state Wrongful Death Statute is to be determined by the state rule of contributory negligence or by the admiralty rule of comparative negligence?

2. Whether a state wrongful death statute may be extended by a Federal Court, to encompass an action for unseaworthiness, without evidence of legislative intent?

3. Whether a Federal Court may enforce a state created remedy without regard to the substantive law of the state?

4. Whether the warranty of seaworthiness extends to a shoreside electrician employed by a sub-contractor, to clean generators aboard a vessel while it was out of operation in a repair yard?

5. Whether a jury should be permitted to draw inferences when there is a complete absence of probative facts to support the conclusion reached?

The Statute Involved

The plaintiff sued in the United States District Court for the Southern District of New York to recover damages under the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 through 6, the relevant section of which read as follows:

> "2A:31-1. When Action Lies
>
> When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime."

• • •

Statement of Facts

The plaintiff, as administratrix of the Estate of Walter J. Halecki, brought suit in the United States District Court for the Southern District of New York, to recover damages for the personal injuries and death of the decedent, who died on October 12, 1951, allegedly as a result of the negligence of the defendants and the unseaworthiness of the pilot boat "New Jersey", owned by the defendants. The action was brought pursuant to the New Jersey Wrongful Death Act, N.J.S.A. 23:31-1, and the complaint alleged diversity of citizenship.

The facts which took place prior to trial in the District Court were as follows:

On September 22, 1951, the pilot boat "New Jersey" was turned over to Rodermond Industries, Inc., for the purpose of annual overhauling and inspection, which were undertaken by Rodermond in accordance with an agreement with the defendants. At the time of the incident the vessel was moored at a pier in the repair yard of Rodermond, North River, Jersey City, New Jersey, and was out of operation. The only employee of the defendants aboard was a watchman.

Walter Halecki, the plaintiff's decedent, was an electrician employed by K & S Electrical Company, a sub-contractor engaged by Rodermond to do electrical work aboard the ship. Neither K & S nor Rodermond, both Jersey corporations, are parties to this action. On September 29, 1951, the decedent came aboard the vessel together with a co-employee of K & S Electrical Company, one Donald Doidge. These electricians received their instructions

from their employer, K & S Electrical Company, which had undertaken to perform electrical work on the ship, in accordance with specifications given it by Rodermond Industries, Inc. These specifications included cleaning the generators on the ship, which was the work performed by the decedent and Mr. Doidge on September 29, 1951.

Donald Doidge, who had previously given a deposition for the defendants, testified on behalf of the plaintiff at the trial. Mr. Doidge was the only factual witness introduced by the plaintiff, and was the only person present at the time the work was done, in addition to the decedent.

Mr. Doidge, who was in charge of the work, testified that the date, the time and the manner in which this work was to be done, were left to his discretion, and that the customary method for cleaning generators was by use of carbon tetrachloride. On September 28, 1951, the day before the work was actually done, Doidge and Halecki set up the equipment which was to be used, including air hoses and an electric blower, supplied by Rodermond. The power was produced by shore generators, owned by Rodermond, as the "New Jersey" was a dead ship, i.e., it did not produce its own power.

On the morning of September 29, 1951, the K & S employees, under the supervision of Mr. Doidge, set up portable blowers in the engine room where they were working, and also brought gas masks with them, as the cleaning of the generators was done by spraying them with carbon tetrachloride. The engine room where this work was done was only one level below the main deck, and both doorways and the skylight were open. The ship's ventilation system was also operated by power from a generator on shore.

Mr. Doidge testified that the decedent did most of the actual spraying, and that he wore a gas mask during the performance of the work, which continued uneventfully from 8:30 A.M. to 4:00 P.M. The decedent left Mr. Doidge without making any complaint other than that he had a peculiar taste in his mouth.

Mr. Halecki became ill at home, and on October 2, 1951, was admitted to the Medical Center in Jersey City, where he died on October 12, 1951. The hospital record stated that the cause of death was carbon tetrachloride poisoning, and the record also disclosed that the decedent had habitually consumed excessive amounts of alcohol.

Mr. Doidge testified that all of the equipment and ventilation systems had operated perfectly during the day, and that in his opinion the ventilation was adequate, and also that he and the decedent had used carbon tetrachloride on many occasions, and were completely familiar with its properties.

Robert Gaines, a bio-chemist, testified as an expert on behalf of the plaintiff, regarding the qualities of carbon tetrachloride, and the degree of concentration necessary to produce a dangerous condition. Mr. Gaines had never been aboard the pilot boat "New Jersey", and his testimony as an expert was based upon the description of the engine room given by witness, Donald Doidge, and also upon certain photographs of the engine room which had been introduced.

Mr. Gaines testified that a safe concentration of carbon tetrachloride was 100 parts per million, and that in his opinion, a concentration of 20,000 parts per million existed

in the engine room of the pilot boat "New Jersey". Upon cross-examination, Mr. Gaines admitted that the concentration of carbon tetrachloride would depend upon such factors as the horse power of the ventilator motors, the location of the ducts, the size and angle of the fan blades, the location of exhaust vents, the size and arrangement of portable blowers and air hoses, and the condition of the gas mask used. The witness further testified that these factors, which were unknown to him, were essential in estimating the concentration.

The defendants introduced the testimony of William M. Finkenaur, a marine engineer who had actually tested the ventilation system aboard the vessel. Mr. Finkenaur testified that the system was entirely adequate and efficient to perform the function for which it was designated.

The defendants also produced as an expert witness, Dr. Milton Helpern, the New York State Medical Examiner, who emphasized that a person who drinks to excess has a strong pre-disposition to carbon tetrachloride poisoning. Dr. Helpern reviewed the medical records of the decedent, and stated, that in his opinion, Mr. Halecki's history of alcoholism created a susceptibility to a slight exposure of the substance.

The case was tried before the Honorable Edward Weinfeld and a jury in December, 1956, and January, 1957, and resulted in a jury verdict in favor of the plaintiff in the total amount of $65,000. After judgment was entered, the defendants filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit.

The appeal was argued in the United States Court of Appeals for the Second Circuit on November 21, 1957,

before Circuit Judges Hand, Lumbard and Hincks. On January 10, 1958, the opinion of the Court of Appeals was handed down and judgment entered. The majority, consisting of Circuit Judges Hand and Hincks affirmed the judgment of the District Court, and Circuit Judge Lumbard dissented.

The majority opinion delivered by Circuit Judge Hand held that the decedent performed the type of work which entitled him to the warranty of seaworthiness, and that the New Jersey Death Statute was broad enough to encompass a claim for unseaworthiness. The majority also held that the Trial Court properly applied the maritime rule of comparative negligence rather than the state doctrine of contributory negligence. The majority rejected the appellant's contention that the record below was insufficient to support the jury verdict.

The dissenting opinion of Circuit Judge Lumbard held that the decedent's work as a shoreside electrician was not that traditionally done by seamen, and he therefore was not entitled to the warranty of seaworthiness. Circuit Judge Lumbard also disagreed with the majority's view that a maritime claim brought pursuant to the New Jersey Death Statute was not subject to the defense of contributory negligence.

Subsequently, on January 24, 1958, the petitioner filed a petition for re-hearing and a petition for hearing in banc, together with a motion to stay the mandate. The petition for re-hearing was denied on January 31, 1958, with Circuit Judge Lumbard dissenting. The petition for hearing en banc was denied on February 20, 1958, again over the dis-

sent of Circuit Judge Lumbard. The motion to stay the mandate was unanimously granted on February 27, 1958.

Reasons for Granting of Writ

1. The United States Court of Appeals for the Second Circuit, in applying the admiralty rule of comparative negligence to an action brought under a State Death Statute, acted in conflict with every other circuit which has passed upon the question.

The State Rule of Contributory Negligence has been uniformly applied to actions arising under the various Lord Campbell's Acts. *Graham* v. *A. Lusi Ltd.*, 206 F. 2d 223 (CA—5, 1953); *Hartford Accident & Indemnity Company* v. *Gulf Refinery Company*, 230 F. 2d 346 (CA—5, 1956); *Byrd* v. *The Napoleon Avenue Ferry Company Inc.*, 125 F. Supp. 573 (E. D. Louisiana, 1954), aff'd 227 F. 2d 958 (CA—5, 1955), cert. denied 351 U. S. 925; *Lee* v. *Pure Oil Company*, 218 F. 2d 711 (CA—6, 1956); *Curtis* v. *Garcia*, 241 F. 2d 30 (CA—3, 1957); *Hill* v. *Waterman*, 251 F. 2d 655 (CA—3, 1958). Please see also *Turner* v. *Wilson Line*, 242 F. 2d 414 (CA—1, 1957).

These decisions were consistent in holding that a remedy given by State law should be applied subject to the limitations of that law. All involved suits brought under State Death Statutes, and all applied the State contributory negligence rule.

The extent of the conflict is indicated by the result in *Hill* v. *Waterman, supra*, decided by the Third Circuit on February 6, 1958, shortly after the Halecki decision was handed down. Here the Third Circuit reaffirmed the hold-

ings of *Klingseisen* v. *Costanzo Transportation Company*, 101 F. 2d 902 (CA—3, 1939) and *Curtis* v. *Garcia, supra*, and applied the State doctrine of contributory negligence to an action brought under the Pennsylvania Death Statute for the death of a longshoreman.

The Third Circuit expressly rejected the application of the admiralty doctrine of comparative negligence. The importance of this disagreement with the Second Circuit is apparent because the majority in the Halecki decision relied heavily upon the holding of the Third Circuit in *Skovgaard* v. *The M/V Tungus*, 252 F. 2d 14, which had been decided on December 23, 1957.[1]

Contrary to the decisions of other circuits mentioned above, the majority opinion in *Skovgaard* held that the state death statute was broad enough to encompass a claim for unseaworthiness. The Court of Appeals for the Second Circuit in the instant case agreed with that position, and took the additional step of applying the Maritime Rule of comparative negligence to a State Wrongful Death Action.

The Court of Appeals for the Second and Third Circuits stand together and oppose the other circuits in the interpretation of the State Death Statutes, but disagree between themselves regarding the rule of comparative or contributory negligence. These conflicts have created legal uncertainties which may directly affect the rights of countless litigants, particularly those engaged in maritime industries.

2. The *Halecki* decision, in applying comparative negligence, conflicted with the position of the New Jersey Courts.

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[1] Counsel for the respondents in the *Skovgaard* case have recently filed a petition for a Writ of Certiorari in this Court. Halecki and Skovgaard are represented by the same counsel, and both petitions involve an interpretation of the New Jersey Death Statute.

It is not disputed that the plaintiff's rights depended upon the New Jersey Death Statute, and that these rights were rooted in State law. The Supreme Court of the United States has ruled that a Federal Court, applying a State remedy, must apply it subject to the limitations of State law. *The Harrisburg,* 119 U. S. 199 (1886) and *Levinson* v. *Deupree,* 345 U. S. 648 (1953).

However, the New Jersey Courts have frequently interpreted the death statute, and it is settled law in that State that contributory negligence is a complete bar to recovery. *Blaker* v. *The Receivers of the New Jersey Midland Railway Company,* 30 N. J. Eq. 240 (1878); *The New Jersey Express Company* v. *Nichols,* 33 N. J. L. 434 (1867); *Donus* v. *Public Service Railway,* 102 N. J. L. 644 (1926).

The inequities thereby created are readily apparent. The obligations of a defendant sued under the New Jersey Wrongful Death Act are imposed on him by State law, which in reason should also be the source of this defendant's rights. However, the *Halecki* decision deprives the defendant of a defense of contributory negligence, which is deeply rooted in New Jersey law.

3. The decision of the Court of Appeals for the Second Circuit, in applying the admiralty rule of comparative negligence to a state created remedy, is in direct conflict with the Supreme Court of the United States.

(a) This Court has frequently stated that substantive rights rooted in State Law are to be protected as zealously as those originating in Maritime Law, and that Federal Courts should not infringe upon these rights. The majority's decision in the *Halecki* case, by disregarding the

New Jersey rule of contributory negligence, is in sharp conflict with that policy.

The opinion of the Court of Appeals for the Second Circuit referred to *Garrett v. Moore McCormack Company*, 317 U. S. 239 (1942), which supports the petitioner's contention. Mr. Justice Black, who delivered the majority opinion in *Garrett*, stated at page 245:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by State law (Erie Railroad Co. v. Tomkins, 304 U. S. 64). And admiralty courts, when invoked to protect rights rooted in State law, endeavor to determine the issues in accordance with the substantive law of the state."

The *Garrett* opinion referred to *Erie Railroad Company* v. *Tomkins*, as did *Pope & Talbot* v. *Hawn*, 346 U. S. 406 (1953). Here it was cited for the proposition that Federal District Courts must try state created causes of action in accordance with State laws. These references to the decision which outlined the relationship between the State and Federal law, disclose the importance placed by the Supreme Court of the United States upon substantive rights given by State law. As far back as *The Harrisburg*, *supra*, decided in 1886, the Supreme Court held that a federal court, applying a state remedy, must apply it subject to the limitations of State law. This principle was affirmed in *Levinson* v. *Deupree*, *supra*.

Please see also *Just* v. *Chambers*, 312 U. S. 383 (1941) and *Western Fuel Company* v. *Garcia*, 257 U. S. 233 (1921).

(b) The Second Circuit in *Halecki* held itself to be consistent with this Court by relying upon *Pope & Talbot* v. *Hawn, supra,* for the proposition that "faults that occur in navigable waters are exclusively the creation of Maritime Law, and are exempt from the defense of contributory negligence . . .".

The *Halecki* majority opinion agreed that the contributory negligence of a decedent had been an absolute defense to an action brought under a Lord Campbell's Act, but cited *Hawn* as the sole authority for the fundamental change.

The petitioner respectfully contends that the rule of the *Hawn* case, involving an injured shore worker, has no application to this action, brought by an administratrix, for wrongful death. The Supreme Court of the United States, in deciding *Pope & Talbot* v. *Hawn, supra,* rejected that State rule of contributory negligence because the plaintiff's right to sue for unseaworthiness and negligence was rooted in Federal Maritime Law. The plaintiff in this action, suing under the New Jersey Wrongful Death Statute, was not seeking to enforce a right rooted in Maritime Law, as no cause of action for wrongful death exists in Maritime Law. *Just* v. *Chambers, Levinson* v. *Deupree,* and *The Harrisburg, supra.*

The misapplication of the *Hawn* rule is made apparent by the following language from the *Hawn* opinion, which was relied upon by the majority in *Halecki*:

> "The right of recovery for unseaworthiness and negligence is rooted in Federal Maritime Law. Even

> if Hawn was seeking to enforce a state created remedy for this right, Federal Maritime Law would be controlling . . ." (pp. 409-410).

The "right" which Hawn was seeking to enforce was a maritime right which should be controlled by the admiralty rule of comparative negligence. However, the right to sue for wrongful death, which the administratrix in the *Halecki* case is seeking to enforce, is one which does not exist under Maritime Law, but is rooted firmly in State Law.

The inconsistency created by a reliance upon the *Hawn* decision as authority for applying comparative negligence to an action for wrongful death is demonstrated by the dissenting opinion of Judge Hartigan in *O'Leary* v. *United States Line Company*, 215 F. 2d 708 (CA—1, 1954). His summary of the appropriate decisions of this Court supports this petitioner's contention that in an action brought under a State Wrongful Death Statute, the plaintiff's remedy and the plaintiff's liability are to be determined by the application of the substantive law of the state.

4. The Court of Appeals for the Second Circuit in *Halecki* was also in conflict with other circuits, in holding that the Lord Campbell's Act was broad enough to encompass unseaworthiness.

In this aspect of the decision, the *Halecki* opinion agreed with the Court of Appeals for the Third Circuit in *Skovgaard*, and the opinions in both cases expressly acknowledged that a conflict existed among the circuits. It is not disputed that the plaintiff in *Halecki* had no remedy for wrongful death under the General Maritime Law. *The Harrisburg, supra; Lindgren* v. *United States*, 281 U. S. 38 (1930); and *Levinson* v. *Deupree*, 345 U. S. 648 (1953).

Therefore, the *Halecki* action, like that of *Skovgaard*, was brought pursuant to the New Jersey Wrongful Death Statute, N.J.S.A. 2A:31-1. The Court of Appeals of the Second and Third Circuits found that a claim based on unseaworthiness could be brought under a Lord Campbell's Act. The opposite conclusion had been reached by the Fifth Circuit in *Graham* v. *Lusi, supra,* and in *Byrd* v. *Napoleon Avenue Ferry Company, supra,* and by the Sixth Circuit in *Lee* v. *Pure Oil, supra.* The respective Courts of Appeals held that the State Death Statutes afforded a recovery only for negligence and not for unseaworthiness.

The decisions cited above involved actions brought pursuant to the Wrongful Death Statutes of various States, all of which are similar in language to the New Jersey Act. The Second Circuit in *Halecki* and the Third Circuit in *Skovgaard,* by permitting recovery for unseaworthiness under the State Death Act directly opposed the position of the Fifth and Sixth Circuits.

5. In holding that the New Jersey Wrongful Death Act provided a remedy for unseaworthiness, the Second Circuit acted without the authority of New Jersey law.

In addition to rejecting the New Jersey rule of contributory negligence, the majority held that the Lord Campbell's Act was broad enough to encompass a death action based upon unseaworthiness. The Second Circuit thereby attributed to the New Jersey legislature an intent to create a remedy to enforce a right which did not exist at the time the statute was enacted.

The decision of the Supreme Court in *Sieracki* v. *Seas Shipping Company,* 328 U. S. 85 (1946), for the first time

extended to a non-seaman the right to sue for unseaworthiness. The New Jersey Death Statute, although originating in 1848, was enacted in its present form in 1937 at a time before the *Sieracki* decision, when the legislature could not possibly anticipate a death action by a shore worker, based upon a breach of the warranty for seaworthiness.

The dissenting opinion of Judge Hastie in the *Skovgaard* case considered this interpretation of the legislative intent "illogical and for that reason unwarranted". Judge Lumbard, dissenting from the majority's view in the *Halecki* decision, found no basis for holding that the New Jersey Legislature intended to abandon the defense of contributory negligence.

Neither the *Halecki* nor the *Skovgaard* decision referred to authority in New Jersey Statutes or decisions for the interpretation that the Death Act provided a basis for recovery for unseaworthiness.

6. The *Halecki* decision was inconsistent with other Circuits, in holding that the decedent, an electrician, was entitled to the warranty of seaworthiness.

The Court of Appeals for the Second Circuit agreed with the appellant's contention that the nature of the decedent's work determined his right to the warranty of seaworthiness. However, the majority opinion held that Halecki, an electrician employed by a sub-contractor to clean generators aboard the vessel, was "cleaning the ship", and that the case therefore fell within the doctrine of *Pope & Talbot* v. *Hawn*, 346 U. S. 406.

The appellant had relied upon *Berryhill* v. *Pacific Far East Line Inc.*, 238 F. 2d 385 (CA—9, 1957), cert. den. 1

L. Ed. 2d 1537, in which the Ninth Circuit had found that the plaintiff was not doing work which entitled him to the warranty of seaworthiness. The Court emphasized that Berryhill, a repairman, was working on the ship's propeller shaft, and that the vessel's propulsion machinery was necessarily out of operation, and pointed out that cases which had extended the warranty to repairmen involved work which was related in some way to the loading of the vessel or with the carriage of cargo. *Torres* v. *The Kastor*, 227 F. 2d 664 (CA—2, 1955); *Pope & Talbot* v. *Hawn, supra; Pettersen* v. *Alaska SS Co.*, 205 F. 2d. 478 (CA—9, 1953).

The circumstances in the instant case were similar to those in *Berryhill*, for in both instances, the work could only be performed when the ship's power was off and the vessel was out of operation. Neither job could be done while the ship was at sea, and therefore neither could be classified as seaman's work. The dissenting opinion of Judge Lumbard in *Halecki* discussed the conflict created by the majority opinion, and found it inconsistent with *Berryhill*. He referred to the nature of Halecki's work, and stated his opinion that spraying generators with carbon tetrachloride was not a seaman's work, but was the task of a shoreside specialist.

Judge Lumbard also referred to the anomolous situation created within the Second Circuit by the decision of *Berge* v. *National Bulk Carriers Corporation*, 251 F. 2d 717, which was decided by the same panel on the same day as the *Halecki* decision. This opinion was also delivered by Circuit Judge Hand, who stated that the plaintiff was not entitled to the warranty of seaworthiness because he did not do seaman's work. Berge was a rigger installing a

bulkhead aboard a ship, and here again the work required that the ship be out of operation. Judge Lumbard stated in dissent that Halecki's work was even more remotely related to a seaman's duties than that done by Berge, and found that the two decisions were clearly inconsistent. The fact that both decisions were handed down by the same panel of the Court serves to accentuate the confusion concerning the type of worker who is entitled to the warranty of seaworthiness. The Court in *Berge* acknowledged that a conflict existed, and Circuit Judge Lumbard concurred for the same reasons which impelled him to dissent in *Halecki*.

7. The Court of Appeals for the Second Circuit also conflicted with decisions of the Supreme Court of the United States in holding that the record justified referring the case to the jury.

In contending that the plaintiff had failed to establish unseaworthiness or negligence at trial, the appellant had pointed out to the Court of Appeals that there was no testimony to establish the conditions complained of aboard the defendant's vessel.

To summarize the plaintiff's case, the only factual witness, Donald Doidge, had stated that the ventilation was adequate. The plaintiff's expert witness had testified that he had never been aboard the vessel and that he was without knowledge of many factors which he admitted were necessary to form an opinion of the conditions which existed.

This Court has frequently expressed the principle that a jury verdict must rest upon affirmative evidence and not

upon speculation. *Moore* v. *Chesapeake & Ohio Railroad Company*, 340 U. S. 573 (1951); *Pennsylvania RR Company* v. *Chamberlain*, 288 U. S. 333 (1933); *Gunning* v. *Cooley*, 281 U. S. 90 (1930).

The circumstances in *Halecki* were clearly distinguishable from the Supreme Court decision of *Schulz* v. *Pennsylvania RR Company*, 350 U. S. 523 (1956). The *Schulz* record contained evidence of several negligent or dangerous conditions which could have caused the death of the decedent. This Court held that the jury should have been permitted to decide which of several possible causes had brought about the accident.

However, the *Halecki* record did not contain proof of any dangerous condition, and the jury was first allowed to speculate upon the existence of a defect aboard the appellant's vessel, and then to further surmise that this supposed condition caused the decedent's death.

An earlier Supreme Court decision emphasized the distinction in *Lavender* v. *Kurn*, 327 U. S. 645 (1946). The Court there was demonstrating that a jury should be permitted, as in the later *Schulz* case, to decide which of several possible inferences is the most reasonable. However, the Court pointed out that there must be evidence upon which to base the inference. It was stated:

> "Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support

the conclusion reached does a reversible error appear" (p. 653).

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated, New York, N. Y., April 28, 1958.

Respectfully submitted,

LAWRENCE J. MAHONEY
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New York 5, N. Y.

APPENDIX

Opinions of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 94—October Term, 1957.

(Argued November 21, 1957 Decided January 10, 1958.)

Docket No. 24551

ANNA HALECKI, Administratrix *ad Prosequendum* of the Estate of Walter Joseph Halecki, deceased, and ANNA HALECKI, Administratrix of the Estate of Walter Joseph Halecki, deceased,

Appellee,

—v.—

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Appellants.

Before:

HAND, HINCKS, and LUMBARD,

Circuit Judges.

Appeal by the defendants from a judgment of the District Court for the Southern District of New York in favor of the

plaintiff in an action to recover damages for the death of the decedent in the State of New Jersey because of the negligence of the defendants and of the unseaworthiness of a pilot boat on which he was employed. Affirmed.

LAWRENCE J. MAHONEY *for the appellants.*

NATHAN BAKER *for the appellee.*

HAND, *Circuit Judge*:

This appeal is from a judgment for the plaintiff entered on the verdict of a jury, awarding damages for the death of the plaintiff's decedent while engaged in cleaning the pilot boat, "New Jersey," belonging to the defendants. The complaint was based upon two counts; one for negligence and the other for unseaworthiness, and four errors are alleged. First, that the evidence was not sufficient to justify a verdict on either count. Second, that the court erred in submitting to the jury any question of seaworthiness. Third, that the court should have charged the jury that under the New Jersey Death Statute contributory negligence was a bar and not a limitation upon damages. Fourth, that the defendants should have been allowed to show that the plaintiff had made inconsistent allegations in another and pending litigation.

On September 22, 1951, the "New Jersey," a pilot boat, was moored at a pier in the repairyard of Rodermond Industries, Inc., North River, Jersey City, for annual overhaul and repairs; the only employee of the defendants on board was a watchman. Part of the work was to clean the ship's generators which had become fouled in use, and Rodermond Industries subcontracted this part of the job

to K. & S. Electrical Company, the employer of the decedent, Halecki. On the 28th he and Doidge, a fellow worker, set up the necessary equipment on the boat. Since she was at the time without any electrical current, it was necessary to bring in current from the shore. The generators were cleaned by spraying them with carbon tetrachloride, a volatile liquid, which will "remove all traces of dirt and film," but whose fumes, unless their density is carefully controlled, may be deadly. The generators were in the ship's engine-room, one deck below the main deck, and Doidge and the decedent sought to protect themselves during the work, (1) by using gas masks, and (2) by bringing two "air hoses" and a "blower," actuated by the current from the shore. One hose was used to spray the tetrachloride upon the generators; the other, to blow in fresh air from the outside. The "blower" was set at the bottom of the engine-room near the generators, and from it led an exhaust pipe to an open door about eight feet above. In addition, the ship's permanent ventilating system was set in action by the outside current; it consisted of some fans and "vents" at the top of the engine-room through which air was drawn in. Thus, means of exhausting the contaminated air consisted of (1) the hose that was not used to spray, (2) the "blower," and (3) the increase of air pressure resulting from the intake of the ship's own ventilating system. Besides this, an open door and an open skylight led to the air. A biochemist, familiar with the use of tetrachloride, after being told in detail the size of the engine-room and the apparatus installed, gave as his opinion that the ventilating system in the engine-room, even when supplemented by the apparatus brought on board and installed by Doidge and

the deceased was not "adequate to remove the fumes." The competence of this expert to give an opinion was so much within the discretion of the trial court that only in a clear case should we overrule its decision.[1] The state law of evidence is no longer the final test of the admissibility of evidence.

As we have said the case was left to the jury in a double aspect: (1) whether the defendants had been negligent in furnishing the deceased as a "business guest" with an unfit place to work, and (2) whether the ship was unseaworthy vis-a-vis a shore worker who came aboard to take part in the annual overhaul. It is obvious therefore that the plaintiff's evidence had to support a verdict on both claims; for we cannot know that the unsupported claim was not the one on which alone they brought in their verdict. As to the claim based on negligence, so far as the defendants mean to argue that the engine-room, equipped as it was, was a reasonably safe place in which to work, we hold that the evidence created an issue that could be decided only by a verdict. The deceased was certainly an "invited person," or "business guest," and the shipowner was liable, not only for the negligence of the master,[2] but, although the work was let out to a subcontractor, also for any lack of "reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let,

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[1] *United States* v. *Miller*, 61 F. 2d 949, 950 (C. A. 2); *Tucker* v. *Loew's Theatre & Realty Co.*, 149 F. 2d 677, 679 (C. A. 2); *Trowbridge* v. *Abrasive Co.*, 190 F. 2d 825, 829 (C. A. 3); 2 Wigmore, §561.

[2] *Leathers* v. *Blessing*, 105 U. S. 626, 630.

or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities."[3] Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the "methods and manner" of its use were proper. So much for the negligence count.

Quite a different question arises as to the warranty of seaworthiness, for, if that attached, it imposed an absolute liability, if the engine-room was not properly equipped. Although in a very scholarly analysis of the earlier decisions, it has been recently argued that the maritime law did not impose such a warranty in favor of seamen,[4] rightly or wrongly the opposite doctrine has become so firmly settled since *The Osceola,* 189 U. S. 158 (1902) that we decline to reconsider the question. All that is left for us on this appeal is whether the warranty of seaworthiness extended to the decedent although concededly he was not a seaman, but as we have said, a "business guest" on a vessel within the navigable waters of New Jersey. In *Guerrini* v. *United States,* 167 F. 2d 352 (C. A. 2), the ship, as in the case at bar, was moored in Brooklyn alongside a dock, and the libellant, an employee of a subcontractor, was engaged in cleaning her boilers and tanks, when he was hurt by slipping on a grease spot. We held that the doctrine of *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, did not apply. However, that was in 1948 before either *Pope & Talbot* v. *Hawn,*

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[3] Restatement of Torts, Vol. II, §344, Comment b.

[4] "Seamen, Seaworthiness and the Rights of Harbor Workers," Francis L. Tetrault, 39 Cornell Law Quarterly, 381.

346 U. S. 406 or *Petterson* v. *Alaska SS. Co.*, 347 U. S. 396, was decided; it is now clear that we were wrong both in limiting the warranty to those doing longshoremen's duties and in supposing that the surrender of "control" of the ship was relevant. We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot* v. *Hawn, supra* (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot* v. *Hawn, supra.*

As might be expected, so shadowy a line of demarcation will in application produce inconsistent results. For example, in *Read* v. *United States,* 201 F. 2d 758, the Third Circuit held that the warranty extended to a "business guest" who was doing part of the work of changing a "Liberty" ship into a transport, while the Ninth Circuit in *Berryhill* v. *Pacific Far East Line,* 238 F. 2d 385, cert. den. 354 U. S. 938, refused relief to a workman who was engaged in "major repairs," as these were described in the District Court (138 Fed. Supp. 859). In the appeal in *Berge* v. *National Bulk Carriers, Inc.* (148 Fed. Supp. 608), decided herewith, we shall state the reasons that impel us to prefer the decision of the Ninth Circuit, but it is not necessary to pass on that question here, because as we have said, the work did not involve any structural changes

in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul. We start therefore with the conclusion that it was proper to leave to the jury, not only the issue of negligence, but that of unseaworthiness.

That does not however answer two other objections: (1) that the plaintiff is not the decedent, but an administratrix, and (2) that the judge left the decedent's contributory negligence to the jury, not as a bar, but only in limitation of damages. It is common ground that the liability for breach of the warranty of unseaworthiness does not survive under the maritime law (*The Harrisburg*, 119 U. S. 199; *Lindgren* v. *United States*, 281 U. S. 38). As to the maritime tort, §33 of the Merchant Marine Act of 1920 (Title 46, §688) gave to "the personal representatives" of a deceased seaman the same remedies that the deceased would have had, had he lived. However, in the case at bar the deceased was not a seaman, so that upon both counts the plaintiff must resort to the "Lord Campbell's Act" of New Jersey[5] which provides in general terms: "When the death of a person is caused by a wrongful act, neglect or default such as would * * * have entitled the person injured to maintain an action for damages * * * the person who would have been liable * * * shall be liable in an action for damages." Much controversy has arisen over the scope of the phrase just quoted, making the liability to the next of kin depend upon an "act, neglect or default" of the putative obligor. When the question arose in the Third

[5] N. J. S. A. 2A:31-1.

Circuit whether these words covered a breach of the warranty of seaworthiness, the court *in banco* by a vote of four to three held (*Skovgaard* v. *The Tungus,* December 23, 1957) that they did. In spite of the zeal with which the contrary has been argued, we think that the majority was right. *Graham* v. *Lusi,* 206 F. 2d 223 (C. A. 5) does not actually hold the contrary; though that may have been the court's opinion. Its decision was based solely on the point of contributory negligence, and did not pass upon the ruling of the district court that the libel could not rest on breach of warranty. *Lee* v. *Pure Oil Co.,* 218 F. 2d 711 (C. A. 5) held that, even vis-a-vis the deceased, there was no breach of warranty, and then went on to say that in any event his administratrix could not recover. The report does not tell us what was the language of the Tennessee statute; but if it was the same as that of New Jersey, we are not persuaded. We hold that "neglect" and "default" both cover a breach of the warranty.

There remains, however, the further question: *i.e.,* whether contributory negligence is an absolute defense. Before the decision of the Supreme Court in *Pope & Talbot* v. *Hawn, supra,* it had been generally held that when a seaman before the Merchant Marine Act of 1920, or a shoreworker thereafter, had been killed because of the negligence of the ship's crew in the navigable waters of a state having a local Lord Campbell's Act, contributory negligence was a bar to an action by his next of kin. This was as true when the suit was in the admiralty as in a court of the state; in short, the bar arising from contributory negligence was an incident of the liability imposed by the state,

no matter where suit upon it was brought.[6] In *Pope & Talbot* v. *Hawn, supra,* however, the Court held that contributory negligence was not a bar to an action at law by a "business guest," but only limited his damages, and this we read to mean that rights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence whether suit upon it is in the admiralty or in an action at law, state or federal.[7] The following language we take from the opinion of the majority in that case, pages 409, 410: "the right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies a state may not deprive a person of any substantial admiralty rights as defined by acts of congress, or interpretative opinions of this Court." Although, as we have said, we are not dealing with "federal maritime law," we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights "rooted in federal maritime law" as it chooses as the model for the right it confers upon the next of kin; but the courts of that state

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[6] *Robinson* v. *Detroit V. C. Steam Navigation Co.*, 73 F. 883 (6th Cir. 1896); *Quinette* v. *Bisso*, 136 F. 825 (5th Cir. 1905); *O'Brien* v. *Luckenbach S.S. Co.*, 293 F. 170 (2d Cir. 1923); *Klingseisen* v. *Costanzo Transp. Co.*, 101 F. 2d 902 (3d Cir. 1939); *Graham* v. *A. Lusi*, 206 F. 2d 233 (5th Cir. 1953); *The A. W. Thompson*, 39 F. 115 (S. D. N. Y. 1889 per Addison Brown, J.); *The James M'Gee*, 300 F. 93 (S. D. N. Y. 1924).

[7] Cf. *Garrett* v. *Moore-McCormick Co.*, 317 U. S. 239.

have never passed upon the question, and to deny the exemption to the next of kin seems to us to the last degree capricious and irrational. Although it was only a dictum, the First Circuit in *O'Leary* v. *United States Lines Company*, 215 F. 2d 708, 711, declared that "it would be incongruous to hold in conformity with Pope & Talbot v. Hawn, supra, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence of death." We are aware that *Curtis* v. *Garcia*, 241 F. 2d 30, 36 (C. A. 3) is to the contrary, but as neither it nor *O'Leary* v. *United States Lines Company, supra*, is authoritative, we are free to choose. Obviously, the answer is not certain; we must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar.

Finally, the defendants complain that the judge refused to allow them to prove that the plaintiff in another action had asserted that Rodermond Industries had control of the vessel. Even though this were an error—on which we do not pass—obviously it was not of enough importance to reverse the judgment.

Judgment affirmed.

LUMBARD, *Circuit Judge* (dissenting):

I cannot agree that we must subscribe to the principle that a shore-based worker who performs any labor on a ship, even though the ship is out of operation and tied fast

to a dock for overhaul, should have extended to him a warranty of seaworthiness merely because the work which he is doing can be generally characterized in terms of the duties which a seaman could be expected to perform. It is not enough to categorize Halecki's work as cleaning ship's equipment. Here the inescapable fact is that Halecki, in spraying the generators with carbon tetrachloride, was doing something which a seaman could not do, which no seaman had ever done, and which would expose the seaman's life to serious danger if he even attempted it.

A summary of the evidence showing how the generators were cleaned by spraying with carbon tetrachloride shows the absurdity of assimilating this work to that of a seaman or of saying that the work "is of a kind that traditionally the crew has been accustomed to do."

On Saturday, September 22, 1951 the pilot boat "New Jersey," owned by the appellants, was turned over to Rodermond Industries, Inc. for its annual overhaul and inspection. It was moored at the Rodermond repair yard pier at the foot of Henderson Street, North River, Jersey City, New Jersey. A list of repairs, prepared by Rodermond the following Monday, September 24 provided that the crew was to remove and replace the eight cylinder heads for the port and starboard generators, and the contractor was to do some work on the cylinder heads. Under the same heading "Port & Star Generators" it was provided:

> "Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order."

Rodermond in turn subcontracted with Halecki's employer, the K & S Electrical Company, to do certain electrical work and to spray the generators with carbon tetrachloride, since neither ship nor shipyard was equipped or competent to do this work. The K & S foreman, Donald Doidge, was at work on the New Jersey from Monday, September 24, and on that day he consulted with the New Jersey's chief engineer as to when the spraying should be done as "we know it has to be done when there is nobody else on board ship." Doidge agreed with the chief engineer that it should be done on Saturday during the absence of the crew, since during the week members of the crew were working on the ship.

Pursuant to these arrangements, Doidge and Halecki made preparations on Friday for the Saturday spraying. Doidge, the shop foreman, had been an electrician for about 25 years and Halecki had worked with him for about 6 years. Not all their work was on ships; they cleaned generators by carbon tetrachloride spray in factories and buildings, wherever the generators were. On Friday they brought on board extra air hoses and a blower belonging to Rodermond. One air hose was used for the spray gun and the other was used underneath the generator as an exhaust to blow the fumes away from the man spraying. A high compression "blower" was placed so that it would exhaust foul air out through one of the two open doorways.

On Saturday morning, September 29, according to the previous arrangement, Doidge and Halecki came aboard to do the spraying. They found only the defendant's watchman, Walter C. Thompson, and they told him to stay out of

the engineroom and not to let anybody down. They brought with them three gas masks belonging to K & S Electric Company. Halecki wore a gas mask and did most of the spraying 10 to 15 minutes at a time with intervening rest periods of equal length. All the equipment for exhausting the fumes and the ship's ventilating system were in operation and run by power supplied from generators on shore. Halecki took sick the next day and died two weeks later. There was sufficient evidence to support the jury's finding that death was caused by carbon tetrachloride poisoning.

Despite history and logic, the trend of decisions in cases involving injuries and death on navigable waters, now further extended by my distinguished colleagues, seems to be guided by what Justice Rutledge has frankly called a "humanitarian policy." *Seas Shipping* v. *Sieracki*, 328 U. S. 85, 95 (1946). This policy seems to be based on the theory that judges are competent to determine that it is better that the shipowners should assume all the burdens because they are able to average them out through insurance or some form of protection against all the hazards of accident which may occur on shipboard to anyone coming on board. The result has been a progressive expansion, both qualitative and quantitative, in the duties and liabilities imposed upon shipowners.[1] From a concept resting on negligence, seaworthiness has, by judicial development, become an absolute duty imposing liability without fault. From a duty running to those we traditionally consider as

[1] See Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Cornell L. Q. 381 (1954); The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 Yale L. J. 243, 252 (1947); Gilmore and Black, The Law of Admiralty, 315-324, 358 (1957).

seamen, exposed to the hazards and discipline of the sea, it has been expanded to include a multitude of harbor workers who report for work in the morning and return to their homes at night. The burdens of proving lack of due care and of defending against the bar of contributory negligence are jettisoned by this judicial legislation. Where there is the slightest support for causation the only question for the jury is the amount of damages.

It may be argued that the initiative taken by the federal courts in imposing absolute liability is justified by their peculiar historical responsibility for admiralty law. And we are told that certain harbor workers come within the ambit of the warranty of seaworthiness because a shipowner cannot escape liability by delegating to others what is traditionally seamen's work. *Seas Shipping* v. *Sieracki*, 328 U. S. 85, 95 (1946). Here we go further. When a lower court charges on both seaworthiness and negligence toward a business invitee, we must assume that the only justification for the charge on seaworthiness is that the shipowner may be found liable despite his own due care. By assimilating certain activities to maritime law, we extend the absolute liability of shipowners, in effect, beyond the shipyard gates. The owner, despite the utmost care, is liable for the activities of a specialist employed expressly because these activities were beyond the range of experience and competence of the ship's crew. These circumstances rebut the contention that the shipowner is nullifying his liability by parcelling out ship's work to others.

The anomaly of the result reached here is pointed up when we consider the restricted liability of the specialist's

employer, who is in the most favorable position to reduce the incidence of injury. Unlike the shipowner, the immediate employer's liability is restricted to the insurance expenses of workmen's compensation or to damages incurred due to his lack of due care. Although the shipowner was not Halecki's employer and this was essentially an industrial injury resulting in the death of a shore-based electrician, an absolute liability of judicial creation is imposed upon the shipowner above and beyond the system developed by New Jersey to compensate for industrial accidents. I had thought that such far-reaching changes in rights and legal duties were solely within the province of the elected representatives of the people in Congress and not the proper business of judges. The traditional responsibility of the federal judiciary for admiralty does not justify such an expansion of liability.

Halecki risked all the hazards of the sea as one might experience them on a Saturday in late September while the ship was made fast to a bulkhead in Jersey City. He was not a seaman, he was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed. Whatever reasons there may be for extending the warranty of seaworthiness to stevedores or other harbor workers who work on board, they do not apply to those employed to do a special job of such a dangerous and unusual nature that it is beyond the competence of ship and shipyard, necessitates the removal and exclusion of the crew, and requires bringing extra equipment aboard for the safe performance of the hazardous activity.

The case of *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (9 Cir. 1956) cert. den. 354 U. S. 938, is authority for the proposition that when the manner of doing the work is foreign to what the ship's crew could do and involves the use of equipment not used or known on ships, there is no warranty of seaworthiness running to those who are injured in the course of doing such work by reason of any defect in the equipment so used. In that case the plaintiff was injured by the shattering of a grinding wheel brought on board by his employer, Todd Shipyards Corporation, for use in repairs being made on the "shaft keyway" on defendant's ship. The Court of Appeals held there was no warranty of seaworthiness with respect to the grinding wheel. Judge Barnes pointed out that to hold otherwise would go beyond the *Sieracki, Hawn and Petterson*[2] cases as the grinding wheel was equipment that the ship could do without, and the shipowner may never have had any reason to know that such equipment existed. That the kind of equipment used is foreign to the vessel is just another way of saying that the work done is not the kind of work normally done by seamen.

My brothers say that this work was merely cleaning a generator and, as cleaning propulsion machinery is the kind of work which seamen would normally do, cleaning a generator is seamen's work and those who do it are entitled to a warranty of seaworthiness. This assimilates spraying with carbon tetrachloride to all cleaning as if it

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[2] *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); *Petterson* v. *Alaska S. S. Co.*, 205 F. 2d 478 (9 Cir. 1953), aff'd per curiam 347 U. S. 396 (1954).

were harmless and commonplace; it is a play on words which by a characterization avoids dealing with a difference in means which completely destroys the validity of the syllogism. Because seamen may be able to do some kind of cleaning does not make seamen of those who do another kind of cleaning which seamen have never done and cannot do; nor does it supply any reason why an outside specialist should be treated, or needs to be treated, like a seaman.

That such general characterization is not a solution is emphasized by *Berge* v. *National Bulk Carriers Corp.*, decided this day. There the same panel of this court holds unanimously that there is no warranty of seaworthiness to a rigger, engaged in installing a tank bulkhead in the course of rebuilding a vessel, who was injured when the shearing of a defective shackle pin caused a chain tackle to fall and knock him from a scaffold. What Halecki did was no more the kind of work that the crew of a vessel was accustomed to do than was what Berge was doing. Indeed, it was less so. One might characterize Berge's work as lowering a heavy load into the hold, a normal seaman's duty done without abnormal risk of harm. Halecki's work was entirely novel and foreign to what seamen had ever done and far more dangerous to anyone who might be aboard. As in *Berge*, the work required the cessation of ship's operations and the removal of the crew.

Passing this point, I must also dissent from the majority's view that under the New Jersey Death Statute, N. J. S. 2A :31-1 (1952), a maritime claim, such as Halecki's, is not subject to the defense of contributory negligence.

There is no basis for saying that the New Jersey legislature meant to abandon the defense of contributory negligence in such cases and it seems to me there is every reason as a matter of common sense and usual practice for saying that they did not mean these cases to be on a different basis. I would adopt the view of *Curtis* v. *Garcia*, 241 F. 2d 30 (3 Cir. 1957). Furthermore, it is difficult enough for admiralty lawyers and judges to keep up with the changes and developments in this field without expecting the members of a state legislature, few if any of whom are admiralty lawyers, to take over sight unseen whatever may be held to come along in the kaleidoscope of maritime rights, as against the doctrine of contributory negligence with which New Jersey and her lawyers have long been familiar. To hold otherwise seems to me to embrace a pure fiction for the purpose of implementing "humanitarian policy."

To refuse to extend the warranty of seaworthiness to Halecki and incorporate by reference comparative negligence into the New Jersey Death Statute would not leave persons in the position of Halecki's survivors without a remedy. Besides the remedies against the employer normally incident to death by industrial accident in New Jersey, see R. S. 34:15-1, 34:15-7, 34:15-8, 34:15-9, R. S. Cum. Supp. 34:15-4, such persons apparently may alternatively elect to proceed against decedent's employer under the Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. A. §901 *et seq.* See *Davis* v. *Dept. of Labor and Industries of Washington*, 317 U. S. 249 (1942); *Dunleavy* v. *Tietjen & Lang Dry Docks*, 17 N. J. Super. 76, 85 A. 2d 343 (Cty. Ct. 1951), aff'd 20 N. J. Super. 486, 90 A.

2d 84 (App. Div. 1952). Nor does our refusal foreclose actions against the shipowner or the shipyard for their failure to exercise due care. Indeed such an action was brought by this appellee against Rodermond Industries for its alleged negligence in the events which led up to Halecki's death. Moreover our reversal in this action would permit retrial of the cause against the shipowner on the theory of negligence.

I would dismiss so much of the complaint as relies on a warranty of seaworthiness, and reverse and remand for a new trial on the issue of negligence.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of January, one thousand nine hundred and fifty-eight.

Present: HON. LEARNED HAND
HON. CARROLL C. HINCKS
HON. J. EDWARD LUMBARD
Circuit Judges

ANNA HALECKI, Administratrix ad Prosequendum of the Estate of Walter Joseph Halecki,

Plaintiff-Appellee,

—v.—

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk